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was to hold such a provision constitutional under the Sixteenth Amendment.²⁰ In reversing the decision, the Supreme Court merely held that a stock dividend was not income within the meaning of the statute, so that the constitutional question is yet to be decided. The reasoning of the Supreme Court, that a stock dividend is not income, is just as applicable to the constitutional question as it was to the interpretation of the statute. There is, however, a vital difference between the two issues. Not only must the language of the Constitution be given a liberal interpretation as opposed to the strict and narrow construction given the same language in a statute imposing a tax, but there exists also the well-defined policy, often expressed by the courts,²¹ although sometimes not followed,²² that a statute shall not be declared unconstitutional unless it is so beyond a reasonable doubt.²³ Where a coördinate branch of the government has put one interpretation on the Constitution, that interpretation should be upheld by the courts if it is within reason. There is no question but that, when a corporation accumulates a surplus, the stockholder is enriched thereby, although he may have no direct control over those earnings, for the market value of his stock has been increased. If a cash dividend is then declared, the stockholder receives an income which is taxable, and the value of his stock falls in proportion to the amount of the dividend. If a stock dividend is declared, the value of the outstanding stock, the old plus the new, is about the same as it was before the issue. Is it reasonable for Congress to say that by this issue the stockholder, who has been enriched by the prosperity of the corporation, has received an income? Can the tax on the stock dividend be upheld as a tax, in effect, on the rise in value of the securities due to the accumulation of the surplus?²⁴ That is the question on which the Supreme Court must pass.

RIGHT TO DISCONTINUE EMINENT DOMAIN PROCEEDINGS. — There is in every state, in the federal law, and in England some statutory¹ provision controlling the exercise of the power of eminent domain.² However, the statutes very generally fail to go into detail, so a very considerable body of eminent domain law must come from the courts.

²⁰ "The Congress shall have the power to levy and collect taxes on incomes, from whatever sources derived, without apportionment among the several states, and without regard to any census enumeration."

²¹ See the cases cited in THAYER, LEGAL ESSAYS, 13-19.

²² See a Note in the January number of this REVIEW, 31 HARV. L. REV. 475, and an address, cited therein, by Roscoe Pound, TRANSACTIONS, MARYLAND BAR ASSOCIATION (1909), 301.

²³ THAYER, LEGAL ESSAYS, 20-33; COOLEY, CONST. LIMITATIONS, 253-57.

²⁴ It must always be kept in mind that if property is sold at a profit, that is, if the stockholder realizes on this rise in value of his securities by selling them, that profit is taxable as income. COMP. STAT. (1916) § 6336 b [c].

¹ Statute is used throughout this discussion in its broad sense, *i. e.*, as designating the written law as contradistinguished to unwritten law.

² STIMSON, AMERICAN STATUTORY LAW, §§ 90-97 and §§ 1140-49; NICHOLS, EMINENT DOMAIN (2 ed.), § 204; The Lands Consolidation Act, 8 VICT. c. 18 (1845).

Owing to the peculiar relation between the parties to an eminent domain proceeding the results have not been uniform. An interesting example of this situation is to be found where the question is at what time do the rights of the parties vest, or, as raised in the recent case of *York Shore Water Co. v. Cord*,³ when is it too late for the condemnor to discontinue or abandon, without being held for the full assessed value of the property which he has taken some steps to condemn. It is settled in the United States, in the absence of an express statute to the contrary, that the proceedings may be discontinued at any time before confirmation of assessment, or judgment on a verdict.⁴ But in some states this right to discontinue is conditional on the condemnor reimbursing the owner for any expense that he may have incurred and paying court costs.⁵ On the other hand, it is settled that after the taking is once completed there can be no recovery of the money paid as compensation.⁶ Between these two extremes the authorities are conflicting in their results, and, even where the same result is reached, the courts frequently differ in their reasons.⁷ By the weight of authority in the United States the condemnor may discontinue or abandon even after confirmation or judgment, and the indication is that abandonment or discontinuance may be at any time before compensation is actually paid or secured, and before possession of the property is taken.⁸

³ 102 Atl. 321 (Me.). See RECENT CASES, page 800.

⁴ LEWIS, EMINENT DOMAIN (3 ed.), § 954. *Denver & New Orleans R. R. Co. v. Lamborn*, 8 Colo. 380, 8 Pac. 582; *Graff v. Baltimore*, 10 Md. 544; *Andrus v. Bay Creek Ry. Co.*, 60 N. J. L. 10, 36 Atl. 826; *Milwaukee, etc. R. R. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113.

⁵ *Pine Bluff, etc. Ry. Co. v. Kelly*, 78 Ark. 83, 93 S. W. 562; *Mellichor v. Iowa City*, 116 Iowa, 390, 90 N. W. 8; *Matter of Water Commissioners of Jersey City*, 31 N. J. L. 72; *Matter of Waverly Water Works*, 85 N. Y. 478; *Moravian Seminary v. Bethlehem*, 153 Pa. St. 583, 26 Atl. 237.

⁶ NICHOLS, EMINENT DOMAIN (2 ed.), § 417. *Shannahan v. City of Waterbury*, 63 Conn. 420, 28 Atl. 611; *Wood v. Trustees of State Hospital*, 164 Pa. St. 159, 30 Atl. 237.

⁷ LEWIS, EMINENT DOMAIN (3 ed.), § 955; NICHOLS, EMINENT DOMAIN (2 ed.), § 417; MILLS, LAW OF EMINENT DOMAIN (2 ed.), § 312. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *O'Neill v. Freeholders of Hudson Co.*, 41 N. J. L. 161; *Chicago v. Barbican*, 80 Ill. 482; *Matter of Rhinebeck R. R. Co.*, 67 N. Y. 242. The New Jersey court goes on the theory that the condemnor should be permitted to have the price finally ascertained and have a reasonable time thereafter to accept or reject. The Illinois court adheres strictly to the provision that compensation shall be paid for property taken, and says no right to compensation exists until property is taken. The New York court considers the original assessment a sufficient basis for condemnor's election and says that if it elects to go on it is bound thereby. In England there can be no discontinuance after notice to treat. LLOYD, LAW OF COMPENSATION (6 ed.), chap. III. *Rex v. Hungerford Market Co.*, 4 B. & Ad. 327. But the rule is not so strict if condemnors are government commissioners. *Reg. v. Commissioners*, 19 L. J. Q. B. 497. The theory of the English courts is that a contract is made when notice to treat is given.

⁸ *Denver & New Orleans R. R. Co. v. Lamborn*, *supra*; *Chicago v. Barbican*, *supra*; *Manion v. Louisville St. L. & T. Co.*, 90 Ky. 491, 14 S. W. 532; *Graff v. Baltimore*, *supra*; *Hunt v. Whitney*, 45 Mass. 603; *Williams v. N. O., M. & T. R. R. Co.*, 60 Miss. 689; *Silvester v. St. Louis*, 164 Mo. 601, 65 S. W. 278; *O'Neill v. Freeholders of Hudson Co.*, *supra*; *State v. Cincinnati & Indiana R. R. Co.*, 17 Ohio St. 103; *Stacey v. Vermont Cen. R. R. Co.*, 27 Vt. 39; *Port Angeles Pac. R. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, *supra*. See 20 HARV. L. REV. 574. *Contra*, *Furbish v. County Commissioners*, 93 Me. 117, 44 Atl. 364; *Drath v. B. & M. R. R. Co.*, 15 Neb. 367, 18 N. W. 717; *Matter of Rhinebeck & Conn. R. R. Co.*,

The usual statutory provision is in effect that no private property shall be taken for a public purpose without just compensation.⁹ The nature of the power to take and of the requirement for compensation is material to a determination of when rights arise out of condemnation. The power of eminent domain is inherent in sovereignty.¹⁰ The requirement that just compensation shall be made is a statutory limitation on that power.¹¹ Next, it is material to determine whether this limitation is a condition precedent or subsequent. If it is precedent no right to take the property can vest in the sovereign until it is performed. The first statutory limitation of this nature is found in the Magna Charta,¹² where "immediate" payment was made necessary. The history of this provision shows that it was important that payment should be required to concur with or precede any right to take the property.¹³ It was with such provisions, and with books whose writers jealously guarded private property¹⁴ before then, that our statute writers adopted similar provisions. A proper interpretation of our constitutional requirements for just compensation, when private property is taken for public purposes, would seem to make compensation a condition precedent to the condemnor's right to take possession.¹⁵ The state, or any person to whom it has delegated its power of eminent domain, should be required to pay, tender, or deposit the assessed compensation before it can have any vested right to take possession of property under condemnation proceedings. Until the condemnor has performed this condition placed upon its power, there is no justification for saying it elects to exercise its powers to take, and until it does so elect to exercise a power which is sovereign, no individual should have a right to payment as if there were a taking. To hold otherwise would in effect be imposing conditions on the power of eminent domain which are not found in the statute.

67 N. Y. 242. In *Pool v. Butler*, 141 Cal. 46, 74 Pac. 444, the court said, "I think the plaintiffs had a right to abandon at any time before the defendants were willing to receive it [compensation], or were in a position to demand it." This is certainly an extreme view when it is noticed that the amount assessed had been deposited with the county clerk pending appeal.

⁹ U. S. CONST. ART. 5, AMEND.; STIMSON, AMERICAN STATUTORY LAW, *supra*.

¹⁰ THAYER, CASES ON CONSTITUTIONAL LAW, 945 *et seq.* In *Boom Co. v. Patterson*, 98 U. S. 403, 406, the court says, "The right of eminent domain, that is, the right to take private property for public uses appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty." See 15 HARV. L. REV. 399.

¹¹ *Boom Co. v. Patterson*, *supra*. In *United States v. Jones*, 109 U. S. 513, 518 the court says, "The provision found in the Fifth Amendment to the Federal Constitution, and in the constitutions of the several states, for just compensation for property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised." See THAYER, CASES ON CONSTITUTIONAL LAW, 945 *et seq.*

¹² Chapter 28, "No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Chapter 30, "No sheriff or bailiff of ours or other person, shall take the horses or carts of any freeman for transport duty against the will of the said freeman."

¹³ MCKECHNIE, MAGNA CARTA (2 ed.), 329, 333-35; TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY, 144.

¹⁴ CHASE'S BLACKSTONE (4 ed.), 78.

¹⁵ 2 KENT, COMMENTARIES (8 ed.), 399, note (a).